Supreme Court, U.S.
FILED

99 88 JUL 12 1999

No. ——— Or.

IN THE
SUPREME COURT OF THE UNITED STATES

MARSHALL D. BISHOFF,
Petitioner,

v.

ARDITH L. BISHOFF,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

WHETHER THE KENTUCKY COURTS HAVE THE AUTHORITY TO RULE THAT VETERANS DISABILITY BENEFITS AND SOCIAL SECURITY BENEFITS, ACQUIRED BEFORE A MARRIAGE DUE TO WAR INJURIES, ARE MARITAL PROPERTY SUBJECT TO DIVISION UPON DIVORCE.

II

BECAUSE THE TRIAL COURT TOTALLY IGNORED THE EVIDENCE AT TRIAL, AND BECAUSE APPELLANT PROVED UNDISPUTEDLY THAT ALL MONIES USED TO PURCHASE THE REAL ESTATE IN QUESTION HEREIN CAME FROM VETERANS DISABILITY BENEFITS AND SOCIAL SECURITY BENEFITS FROM PETITIONER'S BANK ACCOUNT, THE PETITION HEREIN SHOULD BE GRANTED.

LIST OF PARTIES

The captions of the case in this Court contains the names of all parties to the proceedings in the Kentucky Supreme Court. Petitioner has no corporate affiliations.

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OPINIONS BELOW

THE APRIL 14, 1999 OPINION OF THE KENTUCKY SUPREME COURT DENYING DISCRETIONARY REVIEW, WHOSE JUDGEMENT IS HEREIN SOUGHT TO BE REVIEWED, IS REPRINTED IN THE APPENDIX TO THIS PETITION AT APPENDIX A at p. 1a. THE PRIOR OPINION OF THE KENTUCKY COURT OF APPEALS , ENTERED AUGUST 14, 1998, "WHICH WAS TO BE PUBLISHED", IS REPRINTED IN THE APPENDIX OF THIS PETITION AT APPENDIX B at p. 2a. THE TRIAL VERDICT AND JUDGEMENT OF THE TRIAL COURT (HARDIN CIRCUIT COURT) ENTERED ON FEBRUARY 5, 1997 IS REPRINTED IN THIS APPENDIX AT APPENDIX C at p. 8a.

STATEMENT OF JURISDICTION

THE ORDER OF THE KENTUCKY SUPREME COURT DENYING DISCRETIONARY REVIEW WAS ENTERED ON APRIL 18, 1999. THE JURISDICTION OF THIS COURT IS INVOKED PURSUANT TO 28 USC SECTION 1257.

STATEMENT OF THE CASE

In the action herein a trial was held before the Commissioner of Division I of the Hardin Circuit Court, Michael Coyle. The undisputed testimony at trial was that all monies used to pay every cent of the payments on the real estate owned by the parties came exclusively from funds received by Petitioner as VA Disability Benefits that he received as a result of injuries received while in the military, and monies from Social Security Disability Benefits received at the same time that the VA Disability Benefits began for the same injuries. Respondent did not dispute that all monies used to purchase said real estate were from funds obtained by Petitioner as a result of his early military retirement from the United States Army. Petitioner Marshall D. Bischoff entered the United States Army on September 18, 1967. While in the United States Army Marshall D. Bischoff received the Bronze Star Medal, the Army Commendation Medal, the Purple Heart, the National Defense Service Medal, the Vietnam Service Medal, the Republican Vietnam Campaign Medal and a Marksman Medal for firing the M-14. Unfortunately, Marshall D. Bischoff was severely injured while in the United States Army. His injuries in combat resulted in chronic brain disease, loss of the use of his right hand, severe nerve damage, facial damage, epilepsy, and the loss of part of his skull. Attached to this document and marked Appendix C at p. 11a, is a copy of the documents received by Petitioner Bischoff upon his discharge from the military. These documents clearly show that he entered the service on September 18, 1976 and that he left the service after May 29, 1969. They also give the reasons for discharge and specify disabilities. Attached and marked Appendix C at p. 8a, is a copy of the Order entered by the Trial Court. The parties were married for ten years. The divorce was filed in 1997.

QUESTION NO. 1

WHETHER THE KENTUCKY COURTS HAVE THE AUTHORITY TO RULE THAT VETERANS DISABILITY BENEFITS AND SOCIAL SECURITY BENEFITS, ACQUIRED BEFORE A MARRIAGE DUE TO WAR INJURIES, ARE MARITAL PROPERTY SUBJECT TO DIVISION UPON DIVORCE.

The United Stated Supreme Court in Mansell v. Mansell, 109 S. Ct. 2023, 490 U.S. 581, 104 L.Ed.2d 675, held that disability benefits were not subject to division as marital property in a divorce proceeding even though the veteran had simply elected to receive the disability benefits in lieu of regular retirement benefits which would have been subject to division. *Id.* at p.7. The supreme court of Kentucky has also addressed this question in Davis v. Davis, Ky. 777 S.W.2d 230 (1989). The court stated... The existing law, simply put, is that military retirement pay in Kentucky is divisible in Kentucky. Jones v. Jones, Ky. 680 S. W. 2d 921 (1984). On the other hand, Veterans Administration (V.A.) Disability payments to a serviceman who becomes disabled prior to serving twenty (20) years are not divisible as marital property. West v. West, Ky. App., 734 S.W. 2d 31 (1987)...

It is, then, crystal clear that Veterans Administration Disability benefits received by petitioner in this case cannot be divisible as marital property. Likewise, Kentucky's highest courts have long held that social security disability benefits are not divisible. The reason is obvious. Spouses and children also receive benefits when Social Security Disabilities are involved.

The Kentucky Courts do not have the authority or jurisdiction to override Federal Law and declare that either V.A. Disability Benefits or Social Security Benefits are divisible as marital property. (See also Weakley v. Weakley, Ky. 731 S.W.2d 243 (1987). This matter was also addressed by the Supreme Court of Kentucky in McClone v. McClone, Ky. 613 S.W. 2d 419 (1981). In McClone, *supra,* the Supreme Court of Kentucky exactly as the cases above.

In the action the undisputed testimony was that every penny used to purchase the real property purchased by petitioner was with his V.A and Social Security Disabilities.

In McClone, *supra,* the court held that V.A Disability Benefits were a gift under KRS 403.190 (2) and are non-marital.

For these reasons the petition herein MUST be Granted!

QUESTION NO. II

BECAUSE THE TRIAL COURT TOTALLY IGNORED THE EVIDENCE AT TRIAL, AND BECAUSE APPELLANT PROVED UNDISPUTEDLY THAT ALL MONIES USED TO PURCHASE THE REAL ESTATE IN QUESTION HEREIN CAME FROM VETERANS DISABILITY BENEFITS AND SOCIAL SECURITY BENEFITS FROM PETITIONER'S BANK ACCOUNT, THE PETITION HEREIN SHOULD BE GRANTED.

For some strange reason the Trial Court found that the

non-marital interest in the parties real estate had not been properly preserved. This is wrong. (See trial transcript at the time of 14:14:08 to 14:23:30). Also, the Court of Appeals misstated that petitioner's issue was not preserved. This is also untrue. (See the above quote plus the testimony at the very beginning of the trial tape where attorneys are making arguments.)

The testimony at trial was clear and undisputed that all monies used to purchase the real estate in question came from petitioner's V.A. Disability and Social Security Benefits acquired before the marriage.

CONCLUSION

BECAUSE THE REAL ESTATE PURCHASED DURING THE MARRIAGE, BY CLEAR AND UNDISPUTED EVIDENCE, WAS TOTALLY PURCHASED FROM FUNDS RECEIVED BY PETITIONER FROM HIS V.A. DISABILITY BENEFITS AND HIS SOCIAL SECURITY BENEFITS RECEIVED AT THE SAME TIME, AND AS THE FEDERAL AND STATE LAW BOTH HOLD THAT THIS TYPE OF FUNDS ARE NOT DIVISIBLE, THIS PETITION FOR CERTIORARI SHOULD BE GRANTED.

RESPECTFULLY SUBMITTED,

/s/_____

JAMES A. MAPLES
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APPENDIX A

SUPREME COURT OF KENTUCKY

[Filed: April 14, 1999]

No. 98-SC-717-D
(97-CA-375)

HARDIN CIRCUIT COURT
96-CI-132

MARSHALL D. BISCHOFF *Movant*	)
v.	)
ARDITH L. BISCHOFF *Respondent*	)

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Cooper, J., not sitting.

ENTERED April 14, 1999
/s/_____
Joseph E. Lambert
Chief Justice

APPENDIX B

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

[Filed: August 14, 1998]

No. 97-CA-0375-MR

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEPHEN BLAND, JUDGE
ACTION NO. 96-CI-132

MARSHALL D. BISCHOFF *Appellant*	)
v.	)
ARDITH L. BISCHOFF *Appellee*	)

OPINION
AFFIRMING

BEFORE: ABRAMSON, DYCHE, and HUDDLESTON, Judges.

ABRAMSON, JUDGE: Marshall D. Bischoff ("Bischoff") appeals from a judgment awarding Appellee Ardith L. Bischoff ("Ardith") one-half of the equity in the marital residence. He maintains that because this property was

purchased solely with Veterans' Administration disability benefits it is not subject to division as marital property upon dissolution of the marriage. We disagree and affirm.

The facts are not complex. Throughout the parties' ten-year marriage, Marshall was receiving disability benefits from the Veterans' Administration as a result of injuries he received while in the military, as well as benefits from the Social Security Administration. Ardith earned approximately $500 per month from part-time work outside the home, and the parties earned approximately $2000 per year in a joint tobacco enterprise. At a hearing before the trial commissioner, there was conflicting evidence as to whether Marshall's disability payments were co-mingled with sums earned by Ardith and with the proceeds of the tobacco venture. Marshall testified that he made all of the payments on the marital residence from his disability payments. Ardith testified that about half of her income went into household expenses. The trial commissioner determined that Marshall had failed to trace any non-marital interest in the parties' real property and that the property had been acquired through their joint efforts.

Adopting the commissioner's recommendations, the trial judge awarded the martial residence to Marshall, but directed him to pay one-half of the equity in that property to Ardith. Marshall argues in this appeal that because the payments on the residence were made solely form his disability benefits which are exempt from division as martial property by federal statute, the residence must be construed to be his non-marital property.

The treatment of military disability pay in a dissolution

action was explored by the Kentucky Court of Appeals in West v. West, Ky. App., 736 S.W.2d 31 (1987). After briefly tracing the history of federal enactments, the West Court concluded that:

> disability benefits are not considered as [marital] property in a dissolution of marriage, since they are statutorily exempt from all claims other than claims of the United States, and are not divisible or assignable under 38 U.S.C.A. § 3101.[1]

736 S.W.2d at 32. The question to be resolved in this appeal is whether the exempt character of military disability benefits extends to property purchased with the benefit funds. Although we find no Kentucky caselaw directly on point, we are guided by both federal caselaw and the opinions of courts of other jurisdictions which have considered the matter and have concluded that the exemption applicable to the disability payments does not extend to property purchased with those funds.

The relevant federal statute, 38 U.S.C. § 5301, provides in pertinent part that:

> (a) Payments of benefits due or to become due under any law administered by the Secretary [of Veterans Affairs] shall not be assignable except to the extent specifically authorized by

---

[1] We note that § 3101 has since been renumbered § 5301 (a); however, with one minor exception, the relevant language of both provisions is identical.

> law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such Payments.

(Emphasis added.) The United States Supreme Court in Porter v. Aetna Casualty and Surety Company, 370 U.S. 159, 162, 82 S. Ct. 1231, 8 L. Ed. 2d 407, 410 (1962), construed § 3101(a) as exempting veterans' disability benefits only if "the benefit funds... are readily available as needed for support and maintenance, actually retain the qualities of moneys, and have not been converted into permanent investments." In an earlier decision, Carrier v. Bryant, 306 U.S. 545, 547, 59 S. Ct. 707, 83 L. Ed. 976 (1939), the Court had concluded that disability benefits invested in property no longer fell within the immunizing language because they could no longer be considered payments of benefits "due or to become due."

Similarly, the Wisconsin Court of Appeals in Pfeil v. Pfeil, 115 Wis. 2d 502, 341 N.W.2d 699, 702-03 (1983) cited Porter and Carrier as authority for its conclusion in a dissolution action that disability benefit payments invested in a mortgage note and real estate purchase lost their exempt character:

> Recognizing the distinction between benefits payments and property purchased with money therefrom, the high Court [in Carrier] held "it very clear that there was an end to the exemption when they lost the quality of moneys and were converted into land and buildings." Id. at 549, 59 S. Ct. at 709. This is, of course, no more than the reverse side of the coin of the test of "immediately available" as spelled out in Porter. Applied here, it means that the $18,000 bank account retained its exempt status but that the $20,000 invested in the mortgage note lost its exemption.
>
> As to the trial court order that four lots in the state of Florida be put up for sale and the proceeds divided equally between the parties, there is no basis for a successful challenge by the appellant. The trial court found that there had been no claim of exemption raised at the time of trial and held that the appellant's right to raise the issue had been waived. We would agree, but because the case is going back on remand for a new trial court order as to the division of property between the parties, we find reason for going beyond waiver to hold that the lots, like the mortgage note, even if entirely purchased with disability benefits payments, lost their exemption when invested in the real estate purchase. Carrier, 306 U.S. at 549, 59 S. Ct. at 709.

(Emphasis added.) See also Gray v. Gray, 922 P.2d 615

(Okla. 1996) (two vans and motor home purchased with veterans' disability benefits were marital property because exempt status was lost when benefits were converted to personal property).

We are thus convinced, under Porter and Carrier, that Marshall's disability benefits lost their exempt status when invested in the parties' residence. The residence was marital property subject to division in just proportions under KRS 403.190. Having found that Marshall's disability payment funds had been co-mingled with Ardith's earnings and the proceeds of the tobacco enterprise to purchase the property, the trial judge did not err in awarding one-half of the equity in the residence to Ardith.

The judgment of the Hardin Circuit Court is affirmed.
ALL CONCUR.

APPENDIX C

HARDIN CIRCUIT COURT
DIVISION NO. 1

[Filed: February 5, 1997]

Civil Action No. 96-CI-00132

ARDITH L. BISCHOFF
Petitioner

v.

MARSHALL D. BISCHOFF
Respondent

ORDER AND JUDGMENT

This Court, upon the recommendation of the Commissioner, hereby adopts the Commissioner's Finding of Fact and Conclusions of Law and incorporates the same as if fully copied herein.

IT IS HEREBY ORDERED AS FOLLOWS:

1. The marital residence is awarded to Respondent. The Petitioner shall quit-claim her interest in this property to Respondent. The Respondent hall make every effort to remove Petitioner's name from the mortgage on this property.

2. The Respondent shall pay to Petitioner the sum of $35,346.57 as her one-half share of the equity in the marital residence. This amount shall be paid by Respondent paying $346.57 immediately upon the date of this order with the balance of $35,000.00 to be paid over 120 monthly installments of $424.65 per month which includes interest at eight percent (8%) per annum unless the parties agree to a different amortization schedule.

3. The Respondent is awarded the cattle remaining on the parties's marital real property.

4. Each party is awarded the personal property previously divided between them.

5. The Respondent is awarded the four pieces of farm equipment being the elevator, bailer, post-hole digger and disc purchased during the marriage. The Respondent is also awarded all other farm equipment purchased prior to the marriage.

6. The Respondent is awarded the 1983 Ford Truck and the Petitioner is awarded the 1991 Toyota Truck. Each party shall execute any and all paperwork necessary to place the respective vehicles in the owner's sole name. The Respondent shall be responsible for making the payments on these vehicles until paid in full.

7. The parties shall continue to jointly own the mobile home until the debt is paid in full. The parties may transfer this mobile home as they may agree upon or the mobile home shall be sold and the proceeds divided equally.

8. The Petitioner is awarded the two cemetery plots in Elizabethtown Memorial Gardens. She shall be responsible for the balance of indebtedness thereon of $332.75 and hold Respondent harmless from the same.

9. The Petitioner's motion for maintenance is hereby overruled.

SO ORDERED the 5 day of February, 1997.

/s/_____
T. Steven Bland
JUDGE, HARDIN CIRCUIT COURT
DIVISION NO. 1

Hardin Circuit Court Order and Judgment - 2/5/97

ATTACHED MILITARY INFORMATION ON MARSHALL DAVID BISCHOFF

THIS IS AN IMPORTANT RECORD
SAFEGUARD IT

PERSONAL DATA

1. LAST NAME - FIRST NAME - MIDDLE NAME: BISCHOFF, MARSHALL DAVID
2. SERVICE NO.: US 67 C29 796
3. GRADE: SGT (P)
4. DATE OF RANK: 25 [illegible] Dec
5. DEPARTMENT, COMPONENT AND BRANCH OF CLASS: ARMY US INF
6. PLACE OF BIRTH (City and State or County): Bucchel, Kentucky
7. U. S. CITIZEN: [X] YES [ ] NO
8. DATE OF BIRTH: 10 Aug

ENTRY INTO SERVICE DATA

9a. SELECTIVE SERVICE NUMBER: 15 | 118 | 43 | 92
9b. SELECTIVE SERVICE LOCAL BOARD NUMBER, CITY, COUNTY, STATE AND ZIP CODE: LB #118, Shepherdsville, Kentucky 40165
10. DATE OF ENTRY: 12 Sep 67

SEPARATION DATA

11a. TYPE OF TRANSFER OR DISCHARGE: Retired
b. STATION OR INSTALLATION AT WHICH EFFECTED: Walter Reed Army Medical Center Wash DC
c. REASON AND AUTHORITY: Title 10 USC Sec 1201 SPN 271
Permanently Retired by Reason of Physical Disability
d. EFFECTIVE DATE: 29 May 69
12. LAST DUTY ASSIGNMENT AND MAJOR COMMAND: Co A 3/39 Inf 9th Inf Div
13. DECORATIONS, MEDALS, BADGES, COMMENDATIONS, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED:
Bronze Star Medal w/V Device; Army Commendation Medal w/V Device;
Purple Heart w/OLC; National Defense Service Medal; Vietnam Service Medal;
Republic Vietnam Campaign Medal w/Device 1960: Marksman (Rifle M-14)
14. CHARACTER OF SERVICE: HONORABLE
15. MILITARY EDUCATION LEVEL ACHIEVED: DD Form 630A
16. DISTRICT, AREA COMMAND OR COMPARABLE TO WHICH RESERVIST TRANSFERRED: NA
17. REENLISTMENT CODE: RE-4
18. TERMINAL DATE OF RESERVE/UMT&S OBLIGATION: NA
19. CURRENT ACTIVE SERVICE OTHER THAN BY INDUCTION
a. SOURCE OF ENTRY: [ ] ENLISTED (Regular Component) [ ] ENLISTED (Other Service) [ ] REENLISTED [X] OTHER NA
20. TERM OF SERVICE (Years): 2
21. DATE OF ENTRY: 18 Sep 67
22. PRIOR REGULAR ENLISTMENTS: None
23. GRADE, RATE OR RANK AT TIME OF ENTRY INTO CURRENT ACTIVE SVC: PVT E1
24. PLACE OF ENTRY INTO CURRENT ACTIVE SERVICE: Louisville, Kentucky
25. HOME OF RECORD AT TIME OF ENTRY INTO ACTIVE SERVICE: Route #1 40165
Shepherdsville (Bullitt) Kentucky
26. STATEMENT OF SERVICE

		YEARS	MONTHS	DAYS
a. CREDITABLE FOR BASIC PAY PURPOSES	(1) NET SERVICE THIS PERIOD	1	8	12
	(2) OTHER SERVICE	0	0	0
	(3) TOTAL (Line (1) plus Line (2))	1	8	12
b. TOTAL ACTIVE SERVICE		1	8	12
c. FOREIGN AND/OR SEA SERVICE		0	10	28

27a. SPECIALTY NUMBER & TITLE: 11B40 Lt Wpns Inf
b. RELATED CIVILIAN OCCUPATION AND D.O.T. NUMBER: None
28. EDUCATION AND TRAINING COMPLETED: ATP 21-114; Code of Conduct

RECEIVED
JUL 30 1970
UNDER

VA AND EMP. SERVICE DATA

29a. NONDAY PERIODS TIME LOST (This Year): None
b. DAYS ACCRUED LEAVE PAID: 12
30. SERVICEMEN'S GROUP LIFE INSURANCE IN FORCE (NSLI or USGLI): [ ] YES [X] NO
31. AMOUNT OF ALLOTMENT: $ NA
32. MONTH ALLOTMENT STARTED OR TERMINATED: NA
33a. VA CLAIM NUMBER: c. UNK
33b. SERVICEMEN'S GROUP LIFE INSURANCE COVERAGE: [ ] $10,000 [ ] $5,000 [ ] NONE

REMARKS

34. REMARKS
Highest Civilian Education Level: 8 years
Blood Group: "O"
Item 5: Aptd PFC E3 (P) 17 Mar 68
Para 10 AR 610-210 applies

ADDRESS FOR MAILING PURPOSES

35. PERMANENT ADDRESS FOR MAILING PURPOSES AFTER TRANSFER OR DISCHARGE (Street, RFD, City, County, State and ZIP Code):
Route #1
Shepherdsville (Bullitt) Kentucky 40165
36. SIGNATURE OF PERSON BEING TRANSFERRED OR DISCHARGED: [signature]

AUTHENTICATION

37. TYPED NAME, GRADE AND TITLE OF AUTHORIZING OFFICER: FREDRIC I HUTTMAN CPT MSC CO TRANSFER POINT
38. SIGNATURE OF OFFICER AUTHORIZED TO SIGN: [signature]

EXHIBIT "C"

BEST AVAILABLE COPY